FILED
MAY 31 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1025.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MELVERN A. COOPER, RESPONDENT.

PETITIONER'S REPLY BRIEF.

CYRUS CRANE,
GEO. J. MERSEREAU,
JOHN N. MONTEITH,
HORACE F. BLACKWELL, JR.,
Counsel for Petitioner.

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It would extend this reply brief beyond reasonable length to point out all of the fallacies in respondent's brief and argument. We do, however, want to reply briefly to his view of the evidence and theory of the case.

One correction should be made in petitioner's original brief in support of its petition for a writ of certiorari. The word "pass" in the fifth line of the second paragraph on page 37 should be "passed."

I.

Respondent accuses petitioner of inaccuracies and omissions in its statement of the evidence. He charges on pages 2 and 4 of his brief that our citations to the record do not support our statement of the evidence. We state categorically that every statement of fact in the petition is supported by the evidence at the page of the record to which reference is made.

Respondent says (p. 3) that "the positive and undisputed evidence" was that when a car had to be weighed, the billing was not completed until after it had been weighed. True, Cooper so testified upon re-direct examination (R. 114). On the other hand, Robinson, the yardmaster, and Vandeventer, the engine foreman, both testified that the billing of a car was complete when it was placed on the yard check (R. 261, 296, 335, 356). Vandeventer testified (italics are ours):

> * * * when I got that check I seen that was okay, to be—to go out, but it had to be weighed first.
> Q. Now, it had to be weighed in order that you might have the proper billing for the freight charges?
> A. *No, whether it is too heavy or not.*
> * * * * * * *
> Q. That wasn't company material?
> A. No, but a car has a certain amount of capacity to haul.
> * * * * * * *
> Q. * * * Do you know whether this car was billed or not?
> A. *Well, it is billed or it wouldn't be on the checks* (R. 355-6).

Thus, the weighing of the car had nothing to do with its billing and the testimony of Cooper, a switchman who obviously knew nothing about the billing of cars, has no probative force in the face of this positive testimony of the yardmaster and foreman. Cooper himself later admitted on re-cross examination that the weighing of

a car did not postpone its billing. He said (R. 123) "they don't card them at Topeka now. * * * they chalk them," and saw the number 564, the Emporia station number, chalked on the sand car as he rode it south on track 10 (R. 98, 115, 123).

Even if the sand car was not to be billed until after it was weighed, *Philadelphia & Reading Ry. Co.* v. *Hancock,* 253 U. S. 284 (cited on page 30 of our Brief in support of the petition), makes it plain that the sand car was, notwithstanding, in interstate commerce. It was correctly loaded and would therefore have been billed and "put into 29," an interstate train, by the switch crew.

Respondent misstates the testimony of Leon L. Logan, the night yardmaster, in the third paragraph on page 3 of his brief. On pages 15 and 17 it is correctly stated. Logan's testimony was (R. 485-6) that none of the cars on page 3 of the yard check (Deft's. Ex. B, R. 354) "had to go" (not "were to go") on No. 29; that only "perishable goods" on page 3 "have to go" on No. 29; but that although the car of water was not perishable, No. 29 was a proper connection for it.

II.

Respondent's entire argument on the question of interstate transportation disregards the plain, undisputed testimony of Vandeventer, the engine foreman, as to the purpose of the movement. It was to put the sand car on train No. 29, an interstate train. Vandeventer said this and Cooper said that he said it. Vandeventer testifed (all italics ours):

> Q. Then when you got through eating and then what did you do?
>
> A. Well, we come out and I told the boys we would go up in No. 10 and if we had time we would get a car of sand that was in there and weigh it and *put it on train 29* (R. 336).

* * * * * * *

Q. And you had told them that you were going to take the sand car down and weigh it?

A. Yes.

Q. Before you put it on train No. 29?

A. Yes (R. 338).

* * * * * * *

Q. Tell us what * * * the substance of the conversation you and Mr. Cooper had there after he got on the car, and before he fell off?

A. Mr. Cooper looked up at me and he says, * * * "Are you going to weigh that sand and put it on * * * 29"; * * * I says, "*Yes, if we have time we will weigh it and put it on there*," * * * (R. 340-1).

* * * * * * *

Q. And this car of sand, AT-173,233, was the car that you and Mr. Cooper were talking about, going to put on 29?

A. Yes, sir (R. 347).

Cooper testified:

Mr. Monteith: * * * (Reading from deposition:) "Question: Did you have any conversations with the switch foreman there, * * *? Answer: Yes, sir. * * * I asked him what we were going to do about making up No. 29. Question: And what did he say? Answer: * * * *It seems to me we had a car of sand we were getting out of No.* 10 *to weigh for No.* 29; * * * Question: *You were making up a train to go?* Answer: *Yes, sir.* Question: *No. 29?* Answer: *Yes, sir.* * * * Question: And as far as you can remember, the switch foreman said you were going to take that car of sand down to weigh it before you put it on No. 29? Answer: He said something about that, but I don't remember what all he did say now (R. 120-1).

The movement then in which Cooper was engaged at the time of his injury was a movement calculated to put the sand car in an interstate train.

All of the facts and reasonable inferences from the facts affecting the character of Cooper's employment at

the time of his injury are undisputed. Respondent argues otherwise, but he overlooks or disregards material testimony. His argument, as we understand it, is threefold: *first*, there is no evidence that the sand car had been finally billed and assigned for shipment; *second*, there is no evidence that train 29 or any cars to go in it had been placed on track 2 so that the movement was not one to make up a train; and *third*, the purpose of the movement was solely to move the tank car to reach the sand car and weigh it.

The testimony we have heretofore stated on pages 3-4 of this brief and on pages 9 to 11 of our petition answer, we think, respondent's first argument. The sand car appeared on the "west check" (p. 3, Deft's. Ex. B, R. 354), which meant that it was billed to go to Emporia either on No. 29 or No. 91 (R. 265, 250). Which train was selected depended, in part, upon the press of the switch crew's other work and the judgment of the engine foreman and, in part, upon the nature of the other merchandise on the "west check" (Logan testified that perishables on the west check had to go on No. 29, but there was no merchandise of this kind on the west check that night (R. 485-6)). Vandeventer had this yard check when he went to supper that night (R. 335) and decided at that time to send the sand car out on No. 29 if he had time (R. 336). Obviously, he had time, because he was engaged in that very operation when Cooper was hurt. Having started this movement, he would not have changed to some other job in the middle of the operation. Moreover, he testified he had time. He had nothing to do after supper except switch No. 29 when it came in at 9:05 p. m., and the merchandise for No. 29 in the city drag which had not yet come down from the freight house (R. 357-8, 377, 490). Therefore, when Vandeventer decided to switch the sand car and actually started the movement, the car was definitely and finally billed for that interstate train.

Respondent argues that the fact that all of the cars appearing on pages 1, 2 and 3 of the yard check (Deft's. Ex. B, R. 354) did not, in fact, go out on No. 29 or No. 91, contradicts Robinson's and Vandeventer's testimony that the appearance of a car on the yard check is a billing of that car. The fact has no such force. Robinson testified that the cars listed on pages 1 and 2 of the yard check had to go out on No. 29 and No. 91 respectively "unless they are bad-ordered or some other, something else happens that they can't move, * * * (R. 261)." There is no evidence why all of these cars did not move on the trains for which they were billed. Presumably, it was because of some defect in the cars or merchandise or for some other good reason, not because they were not billed. The same thing applies to cars on page 3 of the yard check. This was the reason why the five cars on page 1 listed for No. 29 did not go out on No. 29; not, as the respondent infers (p. 29), "because by putting them in 29 '* * * the load and car limits for train No. 29 would have been exceeded.' "

However, even if it be a fact that the appearance of a car on the yard check is not a billing of it, it is immaterial here. The sand car was actually being switched when Cooper was hurt, for the very purpose of being made a part of No. 29, so that its billing, if ever before ambiguous or tentative, had then become definite and complete.

Respondent suggests (p. 36) that Vandeventer's announced intention of not switching the tank car at the same time he switched the sand car to be put in No. 29 is "almost conclusive" that Vandeventer did not intend to put the sand car on No. 29. We do not agree: To us it proves the contrary. Only one car on page 3 of the yard check (Deft's. Ex. B, R. 354) left Topeka on No. 29 (Resp. Br. p. 17). That car was the tank car (R. 477, 502). Yet Vandeventer intended that the one car on the west check to go out on No. 29 be the sand car, not the tank car, and had begun his switch movement for that

purpose. The tank car was sent out on No. 29 only because the accident prevented the sand car's shipment on that train. There is no testimony at all indicating that had the accident not have happened and the sand car put in No. 29, the tank car would also have been switched and made a part of the same train. The fact that the tank car did go out on No. 29 after the accident does not justify any inference that it would also have gone out on the same train with the sand car had the latter been shipped as planned. Vandeventer's testimony that he did not intend to switch the tank car (R. 359) negatives any such inference.

Rule 384 (p. 31) is of no significance. It relates solely to the duties of the conductor of a freight train, and certainly does not indicate that no car could be billed and assigned for transportation where no waybill was received by the conductor.

Respondent's second argument that no train was being made up is of no consequence. The switching movement of the sand car began about 8:40 or 8:50 p. m. (R. 27). No. 29 was due in Topeka at 9:05 p. m. (R. 358, 501). The purpose of the movement of the sand car was to weigh it and put it on track 2 for No. 29. At the time the switch movement started, the "city drag," *i. e.*, the other cars to be transported on No. 29, had not come down from the freight house. However, when ready, they were to be placed on track 2 and also made a part of No. 29 (R. 357-8, 369, 381-2, 490). Some of these cars carried interstate freight (R. 268-71, 354, 500). The mere fact that there were no cars on track 2 at the time the switching movement of the sand car began or that No. 29 had not yet arrived does not destroy the purpose or character of that movement. If the sand car had been the first car on track 2, to which the other cars, some interstate, would have been attached, the movement of the sand car was nevertheless interstate, because it was made for the purpose of placing the sand car, along with other cars, di-

rectly and immediately and without further movement into an interstate train carrying interstate cars.

Respondent's third argument isolates the preliminary, incidental step of the intended switch and disregards entirely Vandeventer's testimony as to the purpose of the movement. Respondent himself does not believe that the dominant object of the movement was merely to move one intrastate car, the tank car, to get at another car, because he says (p. 35), "The dominant object here to be obtained was to weigh the car of sand, AT-173,233." But even this was not the dominant object of the movement. Vandeventer testified that it was not and his testimony was not disputed. The purpose of the movement was to put the sand car into an interstate train. Removing the tank car to get at and hook onto the sand car was merely incidental to the dominant purpose of the movement.

Respondent's Cases.

Respondent's cases are easily distinguishable upon their very statement. They simply do not apply to the evidence in this case. Here the undisputed facts present a case where a car, billed and assigned for transportation on an interstate train, is actually moving toward a point where, without further movement, it will be made a part of that train and carried to its destination. Cooper was injured in the movement after it had begun. Clearly, he was engaged in interstate transportation or in work so closely connected with it as to be practically a part of it.

This is not a case in which the car is not yet billed and assigned for interstate transportation (*Minneapolis & St. L. R. Co.* v. *Winters,* 242 U. S. 353; *Rice* v. *Baltimore & O. R. Co.,* 6 Cir., 42 F. 2d 387; *Jarvis* v. *Chicago, B. & Q. R. R.,* 325 Mo. 428, 37 S. W. 2d 602); nor a case in which the particular service of the employee at the time of the injury is intrastate, upon the completion of which interstate work is expected or anticipated (*Illinois Central R.*

R. v. *Behrens*, 233 U. S. 473; *Erie R. Co.* v. *Welch*, 242 U. S. 303); nor a case in which the interstate movement is completed and the employee has returned to intrastate work (*Phillips* v. *Union Terminal Co.*, 328 Mo. 240, 40 S. W. 2d 1046); nor a case in which the movement can be divided into two or more separate and independent operations, the one in which an employee is injured being intrastate (*Mayor* v. *Central Vermont Ry. Co.*, 26 F. 2d 905 (S. D. N. Y.); *Siegal* v. *M., K. & T. R. R.*, 342 Mo. 1130, 119 S. W. 2d 376).

In *Poindexter* v. *Cleveland, C. C. & St. L. R. Co.*, 319 Mo. 285, 4 S. W. 2d 1065, plaintiff was working on a standing intrastate car which, so far as the evidence showed, might never be used in or made a part of an interstate movement.

In *Grigsby* v. *Southern Ry. Co.*, 6 Cir., 3 F. 2d 988, no orders had been given or received at the time the movement started in which plaintiff was hurt regarding the subsequent interstate movement. Judge Mack held that it was not within the contemplation or intention of the parties at the time of the admittedly intrastate movement in which plaintiff was injured to engage in the subsequent return trip admittedly interstate, hence (l. c. 990), "there was no connection, direct or indirect between the accident and this latter interstate trip." Here Vandeventer had received orders to weigh the sand car and put it in No. 29 or No. 91 and had begun the movement the very purpose of which was, he specifically testified, to weigh the car and put it in No. 29. Thus, when the switching operation began he clearly contemplated and intended and the purpose of the movement was to make the car a part of an interstate train.

Conclusion.

Petitioner respectfully submits that the Supreme Court of Missouri did not, in conflict with applicable decisions of this court, give proper effect to the undisputed facts in this case establishing as a matter of law the interstate character of Cooper's employment and the applicability of the Federal Employers' Liability Act and that, therefore, this court should exercise its supervisory powers by granting a writ of certiorari to review and reverse the decision of the Missouri Supreme Court.

Respectfully submitted,

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